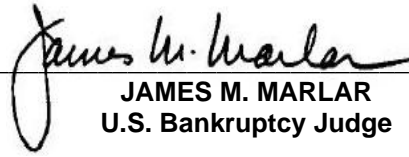


SIGNED.



Dated: May 01, 2009

  
JAMES M. MARLAR  
U.S. Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

In re: ) Chapter 11  
TEMPE LAND COMPANY, LLC, ) No. 2:08-bk-17587-JMM  
Debtor. ) **MEMORANDUM DECISION**

Before the court is the Debtor-in-Possession's (TLC's) motion to borrow money, on a priming basis, from EFO Finance Group, LLC (EFO) (Dkt. #151). A hearing was held on April 29 and 30, 2009, at which time the court heard evidence and considered the legal positions of the various parties.

As the parties are familiar with the background facts, the court need not restate them, and will proceed directly to the issue before it.

TLC proposes to borrow \$7,978,435 from EFO. The ability of a debtor-in-possession (DIP) to borrow money, for reorganization purposes, is expressly authorized by the Bankruptcy Code. 11 U.S.C. § 364. In this case, TLC has asked the court to allow it to borrow, on a secured basis, and grant a lien to the new lender (EFO) which would be senior in priority to the other existing lienholders. The Bankruptcy Code allows this type of repositioning of secured debt. 11 U.S.C. § 364(d).

However, in order to do so, the court must ensure that the existing senior, and soon to be junior lienholders are afforded "adequate protection" for their loss of seniority. § 364(d)(1).

1 In fact, in the face of objection by such senior participants, the court may grant such a request "only  
2 if " adequate protection is provided to the senior lienholders. § 364(d).

3 "Adequate protection" is defined in the Code as requiring either (1) cash or periodic  
4 payments equal to the lessening of a senior lienholder's position, or (2) an additional or replacement  
5 lien on property of value equivalent to the decrease in value of the primed position, or (3) affording  
6 the senior lienholder with something having the "indubitable equivalent" of the lessened position  
7 11 U.S.C. § 361.

8 In the matter today, TLC has offered neither cash nor a replacement lien to the senior  
9 lienholders, and argues that a future corresponding increase to the lien property is the indubitable  
10 equivalent to the immediate loss to be realized by the lienholder, resulting from the insertion of a  
11 \$7.9 million lien in front of them.

12 There is no question but that TLC has diligently labored, and searched the credit  
13 markets for new money to complete the project, in order to ready it for eventual sale or use. (*See*  
14 Ex. 3, 4.) It is also apparent, in the current economy, that DIP financing is not only difficult to find,  
15 but expensive. (*See, e.g.*, Ex. 26--Mortgages Ltd. 20% compounding interest rate, 10% origination  
16 fee; Ex. 2--TLC/EFO 14% interest, 4% origination fee.)

17 If approved, the current requested interim loan of \$7.9 million will see only about \$1.4  
18 to \$2.0 million actually used in the existing project. This is because lender costs, fees and reserves  
19 of approximately \$1.7 million, a payoff of other loans of \$2,750,00 to Stratera, another  
20 approximately \$200,000 to pay off Magellan (Ex. 6,7,10), and a reserve for contingencies and  
21 reorganization expenses of \$607,000, total about \$5,257,000 of costs that do not directly improve  
22 the physical project.

23 Mr. Steven A. Klett testified, as an MAI appraiser, that the TLC unfinished projects  
24 have a current value of \$34,600,000 (Ex. 20). He opined, with the approximate \$2.0 million  
25 infusion directed into the project's construction from the EFO proposed loan, that within 60 days  
26 (July 1, 2009), the project's value would increase by \$9.8 million. This is a predicted 28% increase  
27 in a 60-day period. Mr. Kenneth Loesch, the TLC representative, echoed these sentiments.  
28

1 It is upon these predictions, and only those predictions, that TLC asks the court to find,  
2 as a factual matter, that the "indubitable equivalent" standard has been met. The court has no doubt  
3 as to the witnesses' sincerity, but in this economy, can sincerity or predictions satisfy the  
4 "indubitable equivalent" requirement?

5 Sections 361 and 364 are part of the Bankruptcy Reform Act of 1978, which became  
6 effective October 1, 1979. Happily, that Code was well thought out, well-drafted and well-  
7 documented with reliable legislative history. And, in the 30 years which have passed since its  
8 enactment, courts have followed Congress' balanced approach to the rights of both creditors and  
9 debtors. Even better, the recent, more inartfully-crafted BAPCPA left §§ 361 and 364 untouched  
10 from the 1978 version. As a consequence, court decisions applying those sections are consistent and  
11 easily understood. " 'Indubitable' means 'too evident to be doubted.' " *See In re Arnold & Baker*  
12 *Farms*, 85 F.3d 1415, 1421 (9th Cir. 1996).

13 Here, the proposed TLC borrowing unnecessarily shifts the risk to the current secured  
14 creditors, who are asked to accept TLC's predictions of future success and projections for land  
15 appreciation in a market and economic climate which are today unsettled, depressed and turbulent.

16 "Indubitable equivalent" requires more than a prediction of success for a project that,  
17 sixty days from today, will still be in an unfinished condition, incapable of generating income, and  
18 in need of additional financing. The statute is clear. A court must not allow a secured creditor's  
19 legal position to be diminished in favor of a new lender, absent adequate protection. TLC's evidence  
20 is based only on opinions, which in this market and this economy are not reliable enough indicators  
21 to satisfy the "indubitable equivalent" standard.

22 In a request for a priming lien, a DIP bears the burden of proof. 11 U.S.C.  
23 § 364(d)(2). The difficulty of advocating for the substitution of an indubitable equivalent, upon only  
24 the predicted future appreciation of an asset, is magnified when the existing secured creditor is  
25 already admittedly undersecured. And, predictions of success are equally outweighed by predictions  
26 of failure, especially when the DIP is already in a bankruptcy proceeding.

27 From the evidence presented, the court is not persuaded, by a preponderance of the  
28 evidence, that the proposed DIP borrowing will increase the value of the project by an equivalent

1 or greater value than what the current secured lenders are being asked to give up. Nor is the court  
2 confident that TLC's evidence of a future increase in value was sufficiently credible, as it only  
3 represents an opinion or prediction as to what a future real estate market will likely be over the  
4 course of the next 60 days.

5 Much of the proposed new loan is earmarked for purposes that are not directly tied  
6 to necessary construction. Only about one-quarter to one-third of the borrowed funds are intended  
7 to be used for actual construction or physical improvement. The balance is slated for other  
8 purposes, such as lender fees, interest reserves and the payoff of other loans, none of which directly  
9 benefit the project.

10 In addition, the current uncertainty in Arizona's real estate market does not bode well  
11 for future predictions of value, especially in the short term. Sincere as the parties and witnesses  
12 might be as to their opinions of future value to be brought to this project, the court is not left with  
13 a confidence that priming the current secured creditors' liens will give them the "indubitable  
14 equivalent" of what they are being forced to relinquish. 11 U.S.C. § 361.

15 Thus, the court can answer each of the questions posed by the parties in the joint  
16 statement of issues:

- 17 1. Will the EFO Loan provide adequate protection to the lienholders that  
18 will be primed:
  - 19 a. Will the funding of the DIP Loan on the terms set forth in the  
20 Agreement result in any diminution in the value of the existing  
21 lienholders' interests in the Collateral? **ANSWER: YES**
  - 22 b. Will the funding of the DIP Loan enhance the value of the  
23 Collateral by an amount greater than the amount of the DIP  
24 Loan? **ANSWER: NO**
- 25 2. May the EFO Loan proceeds be used to pay up to \$2.75 MM to  
26 Mortgages Limited to satisfy the "Stratera" Loan? **ANSWER: MOOT**

3. May the EFO Loan proceeds be used to pay certain "soft costs" included in the budget, including Debtor's attorneys' fees, repayment of the affiliate DIP loan and certain other items? **ANSWER: MOOT**

TLC's motion to borrow, on a priming basis, will therefore be DENIED. A separate order will be entered. FED. R. BANKR. P. 9021.

DATED AND SIGNED ABOVE.

COPIES served as indicated below on the date signed above:

Steven N. Berger Engelman and Kevin Judiscak  
Engelman Berger  
3636 N. Central Ave., Suite 700  
Phoenix, AZ 85012  
Email: [snb@engelmanberger.com](mailto:snb@engelmanberger.com)  
Email: [kmj@engelmanberger.com](mailto:kmj@engelmanberger.com)  
Attorneys for Debtor

Renee Sandler Shamblin and Larry Lee Watson  
Office of the U.S. Trustee  
230 N. First Ave., Suite 204  
Phoenix, AZ 85003-1706  
Email: [renee.s.shamblin@usdoj.gov](mailto:renee.s.shamblin@usdoj.gov)  
Email: [larry.watson@usdoj.gov](mailto:larry.watson@usdoj.gov)

Keith L. Hendricks  
Fennemore Craig  
3003 N. Central Ave., Suite 2600  
Phoenix, AZ 85012  
Email: [khendricks@fclaw.com](mailto:khendricks@fclaw.com)  
Attorneys for Committee of Investors (Mortgages Ltd)

Bradley J Stevens and Todd B. Tuggle  
Jennings Strouss  
201 E. Washington St.  
Phoenix, AZ 85004-2385  
Email: [bsteven@jsslaw.com](mailto:bsteven@jsslaw.com)  
Email: [ttuggle@jsslaw.com](mailto:ttuggle@jsslaw.com)  
Attorney for Mortgages Ltd

Jared G. Parker  
DeConcini McDonald Yetwin & Lacy  
7310 N. 16th St., Suite i330  
Phoenix, AZ 85020  
Email: [jparker@dmylphx.com](mailto:jparker@dmylphx.com)  
Attorney for Trustee G. Grant Lyon, Trustee (Radical Bunny)

1 Nancy Kalafa Swift  
Buchalter Nemer  
2 16435 N. Scottsdale Rd., Suite 440  
Scottsdale, AZ 85254-1754  
3 Email: [nswift@buchalter.com](mailto:nswift@buchalter.com)  
Attorneys for General Electric Company

4 Christopher C. Simpson  
5 Stinson Morrison Hecker  
1850 N. Central Ave., Suite 2100  
6 Phoenix, AZ 85004-4584  
Email: [csimpson@stinson.com](mailto:csimpson@stinson.com)  
7 Attorneys for Central Cabinet & Supply Co.

8 Jon S. Musial  
Law Office of Jon S. Musial  
9 8230 E. Gray Rd.  
Scottsdale, AZ 85260  
10 Email: [jon.musial@azbar.org](mailto:jon.musial@azbar.org)  
Attorney for Performance Contracting, Inc.

11 Richard M. Lorenzen  
12 Perkins Coie Brown & Bain  
2901 N. Central Ave., Suite 2000  
13 Phoenix, AZ 85012-2788  
Email: [rlorenzen@perkinscoie.com](mailto:rlorenzen@perkinscoie.com)  
14 Attorney for Unsecured Creditors/Radical Bunny

15 Tamalyn E. Lewis  
Ridenour, Hienton, Kelhoffer, & Lewis  
16 201 N. Central Ave., Suite 3300  
Phoenix, AZ 85004  
17 Email: [telewis@rhkl-law.com](mailto:telewis@rhkl-law.com)  
Attorneys for Heritage Interiors

18 Jeffery M. Hall  
19 Jeffery M. Hall, P.L.C.  
P.O. Box 51955  
20 Phoenix, AZ 85076-1955  
Email: [jmhall102755@cox.net](mailto:jmhall102755@cox.net)  
21 Attorney for Safeguard Security and Communications

22 Dominic Gomez  
Ricker & Bustamante  
23 4530 E. Shea Blvd., Suite 150  
Phoenix, AZ 85028  
24 Email: [dg@rblawoffice.com](mailto:dg@rblawoffice.com)  
Attorney for Schindler Elevator

25 Don C. Fletcher  
26 The Cavanagh Law Firm  
1850 N. Central Ave., Suite 2400  
27 Phoenix, AZ 85004  
Email: [DFletcher@CavanaghLaw.com](mailto:DFletcher@CavanaghLaw.com)  
28 Attorneys for EFO Financial Group

1 Adam B. Decker  
Jackson White  
2 40 N. Center, Suite 200  
Mesa, AZ 85201  
3 Email: [adecker@jacksonwhitelaw.com](mailto:adecker@jacksonwhitelaw.com)  
Attorney for Farnsworth Wholesale Company

4 John R. Clemency  
5 Greenberg Traurig  
2375 E. Camelback Rd., Suite 700  
6 Phoenix, AZ 85016-9000  
Email: [clemencyj@gtlaw.com](mailto:clemencyj@gtlaw.com)  
7 Attorneys for Stratera Protfolio Advisors

8 Brenda K. Martin  
Osborn Maledon,  
9 2929 N. Central Ave., 21st Floor  
Phoenix, AZ 85012-2793  
10 Email: [bmartin@omlaw.com](mailto:bmartin@omlaw.com)  
Attorneys for Powers Steel & Wire Products, Inc

11 Mark J. Giunta  
12 Law Office of Mark J. Giunta  
1413 N. 3rd St.  
13 Phoenix, AZ 85004-1612  
Email: [mark.giunta@azbar.org](mailto:mark.giunta@azbar.org)  
14 Attorney for Hojaca Corporation

15 By /s/ M.B. Thompson  
16 Judicial Assistant